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Supreme Court, U.S.
FILED
JUN 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1919

In The

Supreme Court of the United States

October Term, 1988

CITY OF HAWTHORNE, et al.,

Petitioners,

vs.

EARL WRIGHT, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Do individuals who are excluded from a specific housing development for which they are eligible possess standing to sue for discrimination under the Fair Housing Act, 42 U.S.C. §§ 3601-3631?

II. Did the district court properly exercise its discretion in granting leave to file a supplemental complaint where the issues presented related to the original action, the speedy disposition of the controversy was promoted, and the defendant was not prejudiced?

III. Did the district court properly exercise its discretion as a trial court by: (a) admitting additional evidence that was both important as a matter of preventing injustice and reasonably available; and (b) admitting into evidence a survey whose foundation was established by testimony of the survey director?

LIST OF PARTIES

Respondents include the following parties to the proceedings below: original plaintiffs Ralph W. Keith, Esther May Keith, Harold E. Grady, Edith W. Grady, James B. Gillespie, Helen M. Gillespie, the National Association for the Advancement of Colored People (NAACP), the Sierra Club, the Environmental Defense Fund, Inc., the Freeway Fighters, and additional plaintiffs Earl Wright, Rose Kimball Hillman, Pablo Zapeta, and Minnie Hadley. Respondents California Department of Housing and Community Development and California Department of Transportation, original defendants, were intervenors on the supplemental complaint along with Goldrich & Kest, Inc. Also parties to the proceedings below, as defendants on the supplemental complaint, were petitioners City of Hawthorne, Hawthorne City Council, Betty J. Ainsworth, Steve Andersen, Chuck Bookhammer, Guy J. Hocker, and David M. York. Other parties below were original defendants Secretary of the U.S. Department of Transportation, the Region 7 Administrator of the Federal Highway Administration, the Federal Highway Administration, the U.S. Department of Transportation, the California Highway Commission, the California Department of Public Works, the Director of the California Department of Public Works, and the California State Highway Engineer.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's judgment in this case, which is reported at 858 F.2d 467 (1988).

STATEMENT OF THE CASE

This civil rights and environmental lawsuit was filed in February 1972 by persons living in the path of the then-proposed Century Freeway in the Los Angeles area.

The respondents, including the NAACP, filed this case on behalf of a class of individuals who would be displaced by the freeway, which included minority and poor persons. The complaint sought, *inter alia*, to enjoin federal and state officials to "eliminate discrimination against minority and poor persons seeking replacement housing" in violation of civil rights statutes and the fourteenth amendment. (Pet. at B10, A12.) The parties eventually entered into a consent decree that required state and federal defendants to construct 3700 units of replacement housing with 55% of the units going to low-income displacee households. (Pet. at B13, A13-14.) The district court approved the decree on September 22, 1981 and retained jurisdiction to enforce or amend the decree, which remains in effect. (Pet. at B13, A13.)

In February 1985, the original plaintiffs requested leave to file a supplemental complaint that sought to enjoin the City of Hawthorne, a municipality in the path of the freeway, from refusing to permit two housing developments proposed in order to comply with the consent decree's replacement housing requirements. The supplemental complaint, like the original complaint, alleged that minority and poor displacees were being discriminatorily deprived of replacement housing in violation of civil rights statutes and the fourteenth amendment as well as state statutory and constitutional provisions. (Pet. at B14, A27.) The supplemental complaint also alleged that the Supremacy Clause was violated because Hawthorne's actions impeded the enforcement of the replacement housing provisions of the consent decree. The lead original state defendants and

one of the developers filed complaints in intervention seeking the same relief. (Pet. at B14-15, A27-28 n.25.)

The district court granted leave to file the supplemental complaint and the motions to intervene on April 12, 1985. The court's order of April 15, 1985 found that because "[s]ome allegations asserted in the supplemental complaint are similar to those raised in the underlying action," granting leave to file the supplemental complaint would avoid the possibility of another court rendering a decision that conflicts with the decree, obviate multiplicity of litigation, promote judicial economy, and serve the just, speedy and inexpensive disposition of the action.

Hawthorne, which had opposed the request to file the supplemental complaint, did not seek by certification or writ of mandamus to have the decision on the supplemental complaint reviewed before further proceedings. Instead, Hawthorne consented to advance the trial on the merits and consolidate it with the preliminary injunction hearing. (Pet. at B15, A28.)

On September 3, 1985 – five months after leave to file the supplemental complaint was granted – the court found that Hawthorne had subjected minority and poor displacees to racial discrimination in violation of federal law and discrimination on the basis of low income in violation of state law, and enjoined Hawthorne's illegal actions. Having found statutory liability, the court did not reach any constitutional issues. (Pet. at A36 n.35.)

Hawthorne then appealed. The Ninth Circuit affirmed the district court on the merits (Pet. at B43-45), one judge dissenting solely on whether leave should have been granted to file the supplemental complaint. (Pet. at

B47.) After the Ninth Circuit denied Hawthorne's petition for rehearing and suggestion for rehearing *en banc* on January 24, 1989, Hawthorne filed this petition for certiorari.

REASONS THE PETITION SHOULD BE DENIED

I. Introduction

Unable to challenge the determination of two courts below that it discriminated against respondents in violation of federal and state fair housing laws, Hawthorne continues to complain after the fact that another judge should have decided the question. Another judge, Hawthorne contends, might not have granted leave to file a supplemental complaint, found that the respondents had standing, or made various evidentiary rulings. However, as the Ninth Circuit correctly recognized, the relevant inquiry is not what some other judge may or may not have done, but rather whether the deciding judge acted within his authority. With respect to standing, the two courts correctly applied the settled legal principles of *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). With respect to the remaining issues identified in Hawthorne's petition for certiorari, the Ninth Circuit correctly concluded that the district court properly exercised its authority. Those conclusions are not appropriate for review by this Court because they are consistent with this Court's decisions, conflict with the decisions of no other court of appeals, and would require the Court to engage in the inappropriate task of assessing the evidentiary value of facts.

II. The Ninth Circuit Correctly Applied This Court's Decision in *Arlington Heights v. Metropolitan Housing Development Corp.* in Determining That Respondents Had Standing to Sue for Discrimination Under the Fair Housing Act and Its Decision Does Not Conflict With the Decision of Another Court of Appeals.

As the Ninth Circuit correctly concluded, the question of respondents' standing in this case is controlled by this Court's decision in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). *Arlington Heights* held that sufficient personal injury for standing under the Fair Housing Act could be shown through discriminatory acts excluding low income persons of a minority race from a specific housing project. *See id.* at 264. The individual plaintiff in *Arlington Heights* sought and would have qualified for the housing that was the subject of that litigation. His "quest for housing" was thwarted by discriminatory acts and there was a substantial probability that if the court granted the relief requested he would be afforded the housing opportunity he desired. *See id.* Similarly, additional plaintiffs here testified before the trial court that they would seek to rent an apartment in the freeway replacement housing in question, were eligible to live in that housing under the Century Freeway Housing Program Relocation Apartment standards, and would be precluded from doing so because of the City's acts. (Pet. at A32, B25.) Like the alleged injury of their counterpart in *Arlington Heights*, theirs is "more than a generalized grievance," because "it focuses on a particular project and is not dependent on

speculation about the possible actions of third parties not before the court." 429 U.S. at 264; (Pet. at B26.)

In contending that under *Arlington Heights* respondents could not establish standing absent a showing that Hawthorne was an "all white city," with no available low income housing, petitioners misconstrue this Court's standing analysis as reflected in the *Arlington Heights* opinion. Because article III only authorizes courts to hear "cases or controversies" a court must have before it a party who has suffered "some actual or threatened injury resulting from the putatively illegal action . . . ." *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (citations omitted).[1] Exclusion from a particular housing development satisfies this requirement irrespective of the racial composition of Hawthorne or the availability of other housing.

For the same reasons that the Ninth Circuit's ruling is consistent with *Arlington Heights*, it does not conflict with the Sixth Circuit's decision in *Jaimes v. Toledo Metropolitan Housing Authority*, 758 F.2d 1086 (6th Cir. 1985). In *Jaimes*, the plaintiffs had not been excluded from a particular housing development, but rather expressed only a "general desire" to be housed in a given area, *see id.* at 1097, and were unable to point to any "*specific housing projects* in which they personally intended to, or could afford to, live," *id.* at 1096 (emphasis in the original). The additional housing they sought could not be built without the approval of third parties who were not before the court. Thus, the plaintiffs in *Jaimes* failed both to "demonstrate a

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[1] The so-called "prudential" limitations on standing do not apply to respondents' Fair Housing Act claims. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372-74 (1982).

fairly traceable causal connection between the alleged injury and challenged conduct" and to show that "there [was] a substantial probability" that that injury would be redressed if the court granted the requested relief. *Id.* at 1097. In sharp contrast, respondents did identify specific projects as desired sights for relocation and were not dependent upon non-parties for redress of their injury. The Ninth Circuit's determination that *Jaimes* was inapposite (Pet. at B25-26) is well founded and no conflict requiring this Court's resolution exists.

III. The Ninth Circuit Correctly Applied This Court's Standard for Rule 15(d) Supplemental Pleadings Articulated in *Griffin v. County School Board*, Its Decision Does Not Conflict With the Decision of Another Court of Appeals, and Does Not Present An Important Legal Question.

Observing that the "interests of judicial economy and the liberal interpretation of Rule 15(d) favor granting leave to file a supplemental complaint in this case," the Ninth Circuit held that the district court did not abuse its discretion in permitting the filing of a supplemental complaint. (Pet. at B24.) That determination is completely faithful to *Griffin v. County School Bd.*, 377 U.S. 218 (1964), this Court's seminal decision on Rule 15(d), in which it approved use of a supplemental complaint for the same purpose that the procedure was used in this case.

In *Griffin*, black schoolchildren originally sought in 1951 to enjoin Prince Edward County from denying them admission to racially segregated public schools. The district court granted the requested relief and dismissed the

case. Ten years after the initial case, the black schoolchildren filed a supplemental complaint, adding new parties and seeking supplemental relief: an injunction preventing the County from closing the public schools, and an injunction preventing the State of Virginia, as an additional defendant, and the County from using public funds to provide tuition grants to children attending private schools set up to exclude students on account of race. The court looked to the practical common basis of both complaints in the right plaintiffs sought to vindicate. *See id.* at 226-27. (observing that, as a practical matter, the supplemental complaint "was not a new cause of action but merely part of the same old cause of action"). Noting that the plaintiffs' objective had been "thwarted before 1959 by segregation in the public schools and after 1959 by a combination of closed public schools and state and county grants to white children," *id.*, the Court concluded that:

> Rule 15(d) of the Federal Rules of Civil Procedure plainly permits supplemental amendments to cover events happening after suit, and it follows, of course, that persons participating in these new events may be added if necessary. Such amendments are well within the basic aim of the rules of making pleadings a means to achieve an orderly and fair administration of justice.

Id. (footnote omitted).

Like the plaintiffs in *Griffin*, whose attempts to attend desegregated schools were frustrated by different actions of different parties, low income and minority individuals displaced by the Century Freeway in the instant litigation have had their attempts to secure replacement housing frustrated first by the State, and then by Hawthorne. Like

Griffin, which focused on the vindication of the same underlying right, the Ninth Circuit focused on the continued attempt by the same class of individuals to secure the same basic right to adequate replacement housing. (Pet. at B20.) Indeed, as the Ninth Circuit recognized, the instant litigation presents an even stronger case for permitting a supplemental complaint because a final judgment had been entered in the underlying action prior to the filing of the supplemental complaint in *Griffin*. In contrast, the district court in this case expressly retained jurisdiction over later developments. (Pet. at B20.)

Petitioners' criticisms of the Ninth Circuit's decision are formalistic and seek to graft onto Rule 15(d) the kinds of requirements that the *Griffin* Court explicitly rejected. *See* 377 U.S. at 226-27 (rejecting contention that supplemental complaint was improper where it added new transactions, occurrences, and parties). Thus, the fact that additional plaintiffs were added does not establish a lack of the requisite relationship between the original and supplemental pleading. (Pet. at 17.) Rule 15(d) is intended to accommodate events that transpire after the filing of a suit "and it follows, of course, that persons participating in those events may be added." *Griffin*, 377 U.S. at 226-27.[2] Moreover, petitioners' contention that the two pleadings must be unrelated because the consent decree resolved the original lawsuit is unrealistic. As in

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[2] Hawthorne, of course, is not a new party to this action. As the Ninth Circuit recognized, "Hawthorne has been a party to the litigation for years." (Pet. at B24.) Hawthorne originally joined as a plaintiff in 1972, but subsequently realigned itself with defendants.

Griffin, the original decree is meaningless if its implementation is thwarted by events unforeseen at the time the decree was entered. *See* Pet at B10 ("[F]ulfilling the agreement's terms obviously required the cooperation of the municipalities located in the freeway's path, including the appellant City of Hawthorne.").

Although Hawthorne contends that review of the Ninth Circuit's application of *Griffin* is necessary to resolve a conflict between the Ninth Circuit and another court of appeals on the same matter, (Pet. at 18), the petition fails to identify a single conflicting appellate decision. Indeed the only appellate decision cited is another Ninth Circuit decision. *See* Pet. at 14 (citing *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 668 F.2d 1014, 1057 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982)). That case, which also held that a supplemental complaint is authorized to promote the expeditious disposition of a controversy, does not conflict with the decision in this case and the Ninth Circuit correctly declined *en banc* review.[3]

The Ninth Circuit's ruling is in accord with the decisions of the other courts of appeals. *See, e.g., Rowe v. United States Fidelity & Guaranty Co.*, 421 F.2d 937, 943-44

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[3] In any event, this Court does not sit to review intracircuit conflicts. *See Davis v. United States*, 417 U.S. 333, 340 (1974). Nor does this Court sit to review conflict with a district court, which is the only other authority petitioners cite in support of their claim of conflict. (Pet. at 13.) *See* S.Ct.R. 17.1(a); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955) (requiring a question of importance to the public as distinguished from the parties or a "real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals").

(4th Cir. 1970) (finding supplementation appropriate where a "confluence of actual objectives" existed between original and supplemental pleadings). Numerous district courts have also permitted the filing of a supplemental complaint, absent a showing of prejudice to the defendant. *See, e.g., Lerman v. Chuckleberry Publishing, Inc.*, 521 F.Supp. 228, 231-32 (S.D. N.Y. 1981); *Corum v. Beth Israel Medical Center*, 359 F.Supp. 909, 912-14 (S.D. N.Y. 1973); *Vernay Laboratories, Inc. v. Industrial Electronic Rubber Co.*, 234 F.Supp. 161, 166-67 (N.D. Ohio 1964); *see also Fidenas AG v. Honeywell Inc.*, 501 F.Supp. 1029, 1033 (S.D. N.Y. 1980) (stating that leave to file supplemental complaint is generally granted in the absence of some specific reason for denying it); *Henss v. Schneider*, 132 F.Supp. 64 (S.D. N.Y. 1955) (permitting filing of supplemental complaint adding new defendant, noting that if the defendant's argument were successful, the plaintiff could simply reinstitute the same action). It therefore cannot reasonably be suggested that confusion exists among lower courts as to the standards governing Rule 15(d).

Finally, the petitioners still cannot explain how they have been prejudiced by the district court's decision to permit the filing of a supplemental complaint. The procedure promoted the expeditious resolution of the controversy as evidenced by the fact that the claims against Hawthorne were tried and decided five months after leave to file was granted.[4] The only purported prejudice,

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[4] Cases in which supplementation was inappropriate are not germane. *See, e.g., Otis v. Clapp & Son, Inc. v. Filmore Vitamin Co.*, 754 F.2d 738, 743 (7th Cir. 1985) (prolong litiga-

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as the Ninth Circuit recognized, is the "after the fact conclusion that the district court was biased against them." (Pet. at B22.) The Ninth Circuit correctly rejected this argument as requiring the court to rely on "the speculations of those who did not prevail about what might have occurred before a different judge." (Pet. at B23.)[5] Hawthorne's unsupported *post hoc* assertion of bias does not amount to the kind of important question with which this Court is concerned. *See Sioux City Memorial Park Cemetery*, 349 U.S. at 74 (stating that question must be of importance to the public as distinguished from the particular parties involved).

IV. The Ninth Circuit's Affirmance of the District Court's Evidentiary Rulings Does Not Conflict With the Decision of Another Court of Appeals or Present an Important Legal Question.

The final two questions presented by Hawthorne represent mere evidentiary quarrels with the assessment of the facts in this case and as such are inappropriate for

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tion); *Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1193 (5th Cir. 1982) (undue delay), *vacated on other grounds*, 460 U.S. 1007, *cert. denied*, 460 U.S. 1013 (1983); *Mitchell v. RKO Rhode Island Corp.*, 148 F.Supp. 245, 247 (D. Mass. 1956) (difficulty of trying original and supplemental claim in one action).

[5] Petitioners' claim that the trial judge was biased was never raised in the district court. Petitioners' suggestion that the Ninth Circuit itself is biased in favor of respondents and the contention that a master should have been appointed in this case, (Pet. at 9 and n. 3), were never raised or argued below and are therefore not open to review by this Court. *See Ellis v. Dixon*, 349 U.S. 458, 460, *reh'g denied*, 350 U.S. 855 (1955).

review. *See Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."). Moreover, the Ninth Circuit's conclusions were clearly correct. The Ninth Circuit held that the district court did not abuse its discretion in reopening the proceedings to obtain evidence where it sought evidence that "appear[ed] both to be important as a matter of preventing injustice and to be reasonably available." (Pet. at B29-B30.) This conclusion was based on the district court's finding that the data originally presented was "five to six years old," and more current information was necessary to determine the continuing existence of any discriminatory effect. (Pet. at B29-30, A67.) Reopening for such a purpose is well within the discretion of a district court and rarely is that discretion so exercised held to constitute an abuse. *See, e.g., S.E.C. v. Rogers*, 790 F.2d 1450, 1460-61 (9th Cir. 1986); *Students of California School for the Blind v. Honig*, 736 F.2d 538, 548-49 (9th Cir. 1984), *vacated on other grounds*, 471 U.S. 148 (1985) (per curiam); *Calage v. University of Tennessee*, 544 F.2d 297, 301-02 (6th Cir. 1976).

Petitioners do not contend that the Ninth Circuit misinterpreted the applicable law; they merely disagree with the result. Petitioners' unsupported assertion that the judge became an advocate for the respondents by requesting additional evidence erroneously assumes that he could have known what that evidence would reveal. A similar contention was made by a non-prevailing party and rejected by the Sixth Circuit in *Calage*. *See* 544 F.2d at

301-02 (finding no evidence of bias); *see also* Pet. at B31 (discussing *Calage*).

The Ninth Circuit correctly recognized that the record in this case is far different from that before the Eighth Circuit in *Arthur Murray, Inc. v. Oliver*, 364 F.2d 28, 34 (8th Cir. 1966) in which that circuit held that a district court abused its discretion in reopening a case for further evidence. In *Arthur Murray* the court reopened the case to receive additional evidence on plaintiff's lost profits eighteen months after the parties had submitted their evidence when it was clear that sufficient evidence to evaluate the case had been presented and there was no explanation for the long delay. In sharp contrast, the district court here expressly found that additional evidence was required for it to reach a just determination and there was no delay. (Pet. at B30.)

The Ninth Circuit also correctly ruled on the sufficiency of the foundation for admission of the survey. Although Hawthorne contends that this ruling conflicts with a decision of the Seventh Circuit, no conflict exists because both cases held that the testimony of the survey director is a proper foundation for admission into evidence of the results of a survey. *See Piper Aircraft Corp. v. Wag-Aero, Inc.*, 741 F.2d 925, 931 (7th Cir. 1984); Pet. at B35. Hawthorne's real quarrel is not with a purported conflict of legal rulings, but rather with the lower courts' factual conclusions that Dr. Johnson was the survey director. However, the lower courts had ample evidence in the record to support their conclusion that Dr. Johnson functioned as the survey director. Dr. Johnson wrote the survey instrument, supervised pre-testing of the survey, supervised the conduct of both the telephone and the

door-to-door portions of the survey, and analyzed and summarized all the results. As the only person involved in the oversight of all aspects of the survey, Dr. Johnson was clearly the survey director and qualified to lay the foundation for admission of the survey. The determination that he was the survey director is not clearly erroneous and does not constitute the kind of recurring important legal controversy with which this Court is properly concerned.

CONCLUSION

For the foregoing reasons, respondents respectfully request that this Court deny the petition for certiorari.

June 26, 1989

Respectfully submitted,

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